



NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1803, 1816, and 1852

RIN 2700-AE08

NASA Federal Acquisition Regulation Supplement (NFS): Contractor Whistleblower Protections

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Interim rule.

SUMMARY: NASA is issuing an interim rule amending the NASA FAR Supplement (NFS) to implement statutory requirements providing whistleblower protections for contractor and subcontractor employees and to address the allowability of legal costs incurred by a contractor related to whistleblower proceedings.

DATES: *Effective date:* [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

In accordance with FAR 1.108(d)(3), contracting officers are encouraged to include the changes in this interim rule in major modifications to contracts and orders awarded prior to the effective date of this interim rule.

Comment date: Comments on this interim rule should be submitted in writing to the address shown below on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Interested parties may submit comments, identified by RIN number 2700-AE08 via the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. Comments may also be submitted to Leigh Pomponio via e-mail at leigh.pomponio@NASA.gov. Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of

your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting

FOR FURTHER INFORMATION CONTACT: Leigh Pomponio, NASA, Office of Procurement, e-mail: leigh.pomponio@NASA.gov or phone: 202-358-0592.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule revises the NFS to implement a policy providing whistleblower protections for contractor and subcontractor employees. This rule implements 10 U.S.C. 2409 as amended by section 846 of the National Defense Authorization Act for Fiscal Year 2008(Pub. L. 110-181) and section 827 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239). Section 846, entitled Protection of Contractor Employees from Reprisal for Disclosure of Certain Information, and Section 827, entitled “Enhancement of Whistleblower Protections for Contractor Employees,” made extensive changes to 10 U.S.C. 2409, entitled “Contractor employees: protection from reprisal or disclosure.” Paragraph (g) of section 827 amended paragraph (k) of 10 U.S.C. 2324, “Allowable costs under defense contracts” which is also applicable to NASA contracts. Paragraph (g) is implemented by this interim rule.

Paragraph 827(i)(1) specifies that the amendments made by section 827 are applicable to--

Contracts awarded on or after the effective date;

Task orders entered into on or after the effective date, pursuant to contracts awarded before, on, or after such date; and

Contracts awarded before the effective date, which are modified to include a contract clause providing for the applicability of such amendments.

Paragraph 827(i)(3) requires that at the time of any major modification to a contract that was awarded before the effective date, the head of the contracting agency shall make best efforts to

include, in the contract, a clause providing for the applicability to the contract of the amendments made by section 827.

Section 846 of the NDAA for FY 2008 and Section 827 of the NDAA for FY 2013 created a standalone statute for NASA that is not dependent on the Federal Acquisition Regulation (FAR) coverage. The NASA contractor whistleblower rule is based on an independent statute that applies only to Title 10 agencies. Section 828, Pilot Program for Enhancement of Contractor Whistleblower Protections, of the NDAA for FY 2013 has been implemented in the FAR; see FAR Case 2013-015, 78 FR 60169, <http://www.gpo.gov/fdsys/pkg/FR-2013-09-30/html/2013-23703.htm>. Section 828 establishes a four-year “pilot program” to provide enhanced whistleblower protections for employees of civilian agency contractors and subcontractors and suspend the use of FAR 3.901 through 3.906.

The FAR also incorporates sections 827(g) and 828(d) of the NDAA for FY 2013 (Pub. L. 112-239); see FAR Case 2013-017, 78 FR 60173, <http://www.gpo.gov/fdsys/pkg/FR-2013-09-30/pdf/2013-23764.pdf>, which address legal costs incurred by a contractor in connection with a proceeding commenced by a contractor employee submitting a complaint under the applicable whistleblower section.

B. Discussion and Analysis

The current FAR addresses this subject at subpart 3.9. This rule will add NASA-unique requirements at Subpart 1803.9 of the NFS, entitled “Whistleblower Protections for Contractor Employees.” The subpart covers the policy, procedures for filing and investigating complaints, remedies, clause prescriptions, and a related clause at NFS 1852.203-71, entitled “Requirement to Inform Employees of Whistleblower Rights”.

This interim rule also adds a prescription at 1816.3 and a clause 1852.216-90, “Allowability of Legal Costs Incurred in Connection with a Whistleblower Proceeding” to implement paragraph (g) of section 827 which addresses treatment of cost incurred in connection with whistleblower

proceedings. Due to the effective date of the Act, and because the Act encourage agencies to modify contracts (at the time of any major modification to a contract) that were awarded before the effective date of the Act, it is necessary to create a revised cost principle applicable to any task orders issued against contracts awarded prior to the effective date of this regulation and any contracts modified to implement section 827. Otherwise, FAR clause 52.216-7, Allowable Cost and Payment governs.

C. Changes to NFS

The statutory changes to 10 U.S.C. 2409 made by section 846 of the National Defense Authorization Act for Fiscal Year 2008 and section 827 of the National Defense Authorization Act for Fiscal Year 2013 are implemented in the NFS by adding subpart 1803.9 which heretofore did not exist. This subpart adds NASA-specific whistleblower protections for contractor employees. To fully implement the statutory changes, a prescription and clause is added to create a revised cost principle that covers limited circumstances and a limited time period.

D. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

E. Regulatory Flexibility Act

NASA certifies that this interim rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5

U.S.C. 601, et seq., because the rule neither changes the substance of contract or solicitation procedures or policies nor creates a whistleblower protection for contractor employees. Such protections currently exist, and this case only clarifies contractors' rights and the remedies available to their employees.

F. Paperwork Reduction Act

This interim rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. Chapter 35).

G. Determination to Issue an Interim Rule

A determination has been made by the Assistant Administrator for Procurement, pursuant to 41 U.S.C. 1701(d) that urgent and compelling reasons exist to justify promulgating this rule on an interim basis without prior opportunity for public comment. This action is necessary for the following reasons: First, by operation of law, the revised statute became effective on July 1, 2013 (i.e., Congress included language in section 827 specifically addressing the effective date of the changes to 10 U.S.C. 2409). Second, the revisions impose new responsibilities on agencies and create certain new rights for contractor employees. Specifically, as of July 1, 2013:

- There are changes and additions in the list of entities to whom a whistleblower disclosure makes the whistleblower eligible for additional protections against reprisal;
- Agency heads have expanded responsibilities to take specific actions with regard to a NASA Inspector General finding of reprisal against a contractor whistleblower;
- The law requires that the written notice to employees of their whistleblower rights must be provided in the ``predominant native language of the workforce’’;
- For the first time, contractors must flow down to subcontractors the requirement to provide written notice to subcontractor employees; and

- There is a new exemption for elements of the intelligence community that was not available under previous laws.

The most effective and efficient way to ensure awareness and compliance by agencies and contractors with all of these requirements is through immediate regulatory change. Delaying promulgation may delay the effective date of regulations but will not postpone when the law becomes applicable to contractors and subcontractors. Thus, ordinary notice and comment procedures would unnecessarily increase the risk of confusion and noncompliance, defeating the regulatory objective.

Moreover, there is little likelihood that the publication of this interim rule without prior comment will increase burden on contractors. This interim regulation qualifies as an interpretative rule, as it provides basic guidance that agencies and contractors need to comply with the statute. Indeed, this regulation prescribes little beyond that which is set forth clearly in the statutes.

Nevertheless, pursuant to 41 U.S.C. 1707 and FAR 1.501-3(b), NASA will consider public comments received in response to this interim rule in the formation of the Agency's final rule.

List of Subjects in 48 CFR Parts 1803, 1816, and 1852

Government procurement.

William P. McNally,

Assistant Administrator for Procurement.

Accordingly, 48 CFR Parts 1803, 1816, and 1852 are amended as follows:

1. The authority citation for 48 CFR parts 1803, 1816, and 1852 are revised to read as follows:

Authority: 51 U.S.C. 20113(a) and 48 CFR chapter 1.

PART 1803--IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

2. Add subpart 1803.9 to read as follows:

Subpart 1803.9 – Contractor Employee Whistleblower Protections

Sec.

1803.900 Scope of subpart.

1803.901 Definition.

1803.903 Policy.

1803.904 Procedures for filing complaints.

1803.905 Procedures for investigating complaints.

1803.906 Remedies.

1803.907 Classified information.

1803.970 Contract clause.

Subpart 1803.9 – Contractor Employee Whistleblower Protections

1803.900 Scope of subpart.

This subpart applies to NASA instead of FAR subpart 3.9.

(a) This subpart implements 10 U.S.C. 2409 as amended by section 846 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181), section 842 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417), and section 827 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239).

(b) This subpart does not apply to any element of the intelligence community, as defined in 50 U.S.C. 3003(4). This subpart does not apply to any disclosure made by an employee of a contractor or subcontractor of an element of the intelligence community if such disclosure--

(1) Relates to an activity or an element of the intelligence community; or

(2) Was discovered during contract or subcontract services provided to an element of the intelligence community.

1803.901 Definition.

Abuse of authority, as used in this subpart, means an arbitrary and capricious exercise of authority that is inconsistent with the mission of NASA or the successful performance of a NASA contract.

1803.903 Policy.

(a) Policy. 10 U.S.C. 2409 prohibits contractors or subcontractors from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing, to any of the entities listed at paragraph (b) of this section, information that the employee reasonably believes is evidence of gross mismanagement of a NASA contract, a gross waste of NASA funds, an abuse of authority relating to a NASA contract, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a NASA contract (including the competition for or negotiation of a contract). Such reprisal is prohibited even if it is undertaken at the request of an executive branch official, unless the request takes the form of a non-discretionary directive and is within the authority of the executive branch official making the request.

(b) Entities to whom disclosure may be made:

- (1) A Member of Congress or a representative of a committee of Congress.
- (2) The NASA Inspector General or any other Inspector General that has oversight over contracts awarded by or on behalf of NASA.
- (3) The Government Accountability Office.
- (4) A NASA employee responsible for contract oversight or management.
- (5) An authorized official of the Department of Justice or other law enforcement agency.
- (6) A court or grand jury.
- (7) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.

(c) Disclosure clarified. An employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a NASA contract shall be deemed to have made a disclosure.

(d) Contracting officer actions. A contracting officer who receives a complaint of reprisal of the type described in paragraph (a) of this section shall forward it to legal counsel and to the NASA Inspector General.

1803.904 Procedures for filing complaints.

(a) Any employee of a contractor or subcontractor who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in 1803.903 may file a complaint with the Inspector General of NASA.

(b) A complaint may not be brought under this section more than three years after the date on which the alleged reprisal took place.

(c) The complaint shall be signed and shall contain--

- (1) The name of the contractor;
- (2) The contract number, if known; if not known, a description reasonably sufficient to identify the contract(s) involved;
- (3) The violation of law, rule, or regulation giving rise to the disclosure;
- (4) The nature of the disclosure giving rise to the discriminatory act, including the party to whom the information was disclosed; and
- (5) The specific nature and date of the reprisal.

1803.905 Procedures for investigating complaints.

(a) Unless the NASA Inspector General makes a determination that the complaint is frivolous, fails to allege a violation of the prohibition in 1803.903, or has been previously addressed in another Federal or State judicial or administrative proceeding initiated by the complainant, the NASA Inspector General will investigate the complaint.

(b) If the NASA Inspector General determines that a complaint merits further investigation, the NASA Inspector General will—

- (1) Notify the complainant, the contractor alleged to have committed the violation, and the head of the Agency;
- (2) Conduct an investigation; and
- (3) Provide a written report of findings to the complainant, the contractor alleged to have committed the violation, and the head of the Agency.

(c) The NASA Inspector General –

(1) Will determine that the complaint is frivolous or will submit the report addressed in paragraph (b) of this section within 180 days after receiving the complaint; and

(2) If unable to submit a report within 180 days, will submit the report within the additional time period, up to 180 days, to which the person submitting the complaint agrees.

(d) The NASA Inspector General may not respond to any inquiry or disclose any information from or about any person alleging the reprisal, except to the extent that such response or disclosure is--

- (1) Made with the consent of the person alleging reprisal;
- (2) Made in accordance with 5 U.S.C. 552a (the Freedom of Information Act) or as required by any other applicable Federal law; or
- (3) Necessary to conduct an investigation of the alleged reprisal.

(e) The legal burden of proof specified at paragraph (e) of 5 U.S.C. 1221 (Individual Right of Action in Certain Reprisal Cases) shall be controlling for the purposes of an investigation conducted by the NASA Inspector General, decision by the head of the Agency, or judicial or administrative proceeding to determine whether prohibited discrimination has occurred.

1803.6 Remedies.

(a) Not later than 30 days after receiving a NASA Inspector General report in accordance with 1803.905, the head of the Agency shall determine whether sufficient basis exists to conclude that the contractor has subjected the complainant to a reprisal as prohibited by 1803.903 and shall either issue an order denying relief or shall take one or more of the following actions:

(1) Order the contractor to take affirmative action to abate the reprisal.

(2) Order the contractor to reinstate the person to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.

(3) Order the contractor to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the Agency.

(b) If the head of the Agency issues an order denying relief or has not issued an order within 210 days after the submission of the complaint or within 30 days after the expiration of an extension of time granted in accordance with 1803.905(3)(ii), and there is no showing that such delay is due to the bad faith of the complainant—

(1) The complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint; and

(2) The complainant may bring a de novo action at law or equity against the contractor to seek compensatory damages and other relief available under 10 U.S.C. 2409 in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. Such an action shall, at the request of either party to the action, be tried by the court with a jury. An action under this authority may not be brought more than two years after the date on which remedies are deemed to have been exhausted.

(c) Whenever a contractor fails to comply with an order issued by the head of agency in accordance with 10 U.S.C. 2409, the head of the Agency or designee shall request the Department of Justice to file an action for enforcement of such order in the United States district court for a district in which the reprisal was found to have occurred. In any action brought under this paragraph, the court may grant appropriate relief, including injunctive relief, compensatory and exemplary damages, and reasonable attorney fees and costs. The person upon whose behalf an order was issued may also file such an action or join in an action filed by the head of the agency.

(d) Any person adversely affected or aggrieved by an order issued by the head of the Agency in accordance with 10 U.S.C. 2409 may obtain judicial review of the order's conformance with the law, and the implementing regulation, in the United States Court of Appeals for a circuit in which the reprisal is alleged in the order to have occurred. No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency or designee. Review shall conform to chapter 7 of title 5, United States Code. Filing such an appeal shall not act to stay the enforcement of the order by the head of an agency, unless a stay is specifically entered by the court.

(e) The rights and remedies provided for in this subpart may not be waived by any agreement, policy, form, or condition of employment.

1803.907 Classified information.

Nothing in this subpart provides any rights to disclose classified information not otherwise provided by law.

1803.970 Contract clause.

Use the clause at 1852.203-71, Requirement to Inform Employees of Whistleblower Rights, in all solicitations and contracts.

PART 1816 – TYPES OF CONTRACTS

3. Section 1816.307-70 is amended by adding paragraph (g) to read as follows:

1816.307-70 NASA contract clauses.

* * * * *

(g) As required by section 827 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239), use the clause at 1852.216-90, Allowability of Costs Incurred in Connection With a Whistleblower Proceeding--

(1) In task orders entered pursuant to contracts awarded before September 30, 2013, that include the clause at FAR 52.216-7, Allowable Cost and Payment; and

(2) In contracts awarded before September 30, 2013, that--

(i) Include the clause at FAR 52.216-7, Allowable Cost and Payment; and

(ii) Are modified to include the clause at 1852.203-71, Requirement to Inform Employees of Whistleblower Rights, dated June 2013 or later.

PART 1852--SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Section 1852.203-71 is added to read as follows:

1852.203-71 Requirement to inform employees of whistleblower rights.

As prescribed in 1803.970, use the following clause:

**REQUIREMENT TO INFORM EMPLOYEES OF WHISTLEBLOWER RIGHTS
[AUGUST 2014]**

(a) The Contractor shall inform its employees in writing, in the predominant native language of the workforce, of contractor employee whistleblower rights and protections under 10 U.S.C. 2409, as described in subpart 1803.09 of the NASA FAR Supplement.

(b) The Contractor shall include the substance of this clause, including this paragraph (b), in all subcontracts.

(End of clause)

5. Section 1852.216-90 is added to read as follows:

1852.216-90 Allowability of legal costs incurred in connection with a whistleblower proceeding.

As prescribed in 216.307-70(g), use the following clause:

**ALLOWABILITY OF LEGAL COSTS INCURRED IN CONNECTION WITH A
WHISTLEBLOWER PROCEEDING**

[AUGUST 2014]

Pursuant to section 827 of the National Defense Authorization Act for Fiscal year 2013 (Pub. L. 112-239), notwithstanding FAR clause 52.216-7, Allowable Cost and Payment--

(1) The restrictions of FAR 31.205-47(b) on allowability of costs related to legal and other proceedings also apply to any proceeding brought by a contractor employee submitting a complaint under 10 U.S.C. 2409, entitled ``Contractor employees: protection from reprisal for disclosure of certain information;" and

(2) Costs incurred in connection with a proceeding that is brought by a contractor employee submitting a complaint under 10 U.S.C. 2409 are also unallowable if the result is an order to take corrective action under 10 U.S.C. 2409.

(End of clause)

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